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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/572,719

03/21/2006

Ronald Vermeer

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03/25/2009

BAYER CROPSCIENCE LP

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EXAMINER

FISHER, ABIGAIL L

ART UNIT

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1616

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/572,719	Applicant(s) VERMEER, RONALD	
	Examiner ABIGAIL FISHER	Art Unit 1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 December 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 11-17, 21 and 22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 11-17 and 21-22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on December 18 2008 has been entered.

Receipt of Amendments/Remarks filed on December 18 2008 is acknowledged. Claims 1-10, 18-20 and 23-24 were/stand cancelled. Claim 11 was amended. Claims 11-17 and 21-22 are pending.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 11-17 and 21-22 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 11 recites specific dispersants. Dispersant (ii) indicates an ethylene oxide proportion of between 40 and 60% by weight. It is unclear what the by weight is referring to. Is it the total composition, total polymer (ii), or something else? Dispersant

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(iii) is unclear for the same reasons as it states by weight but does not indicate what the by weight is in relation to.

Claims 12-17 and 21-22 are rejected for depending on a rejected base claim

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Applicant Claims
2. Determining the scope and contents of the prior art.
3. Ascertaining the differences between the prior art and the claims at issue, and resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 11-15, 17 and 21-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schlatter (2004/0127739, cited in the Office action mailed on 12/19/07) in view of Baur (J. Agric. Food Chem., 1999).

Applicant Claims

The instant application claims a suspension concentrate comprising at least one active compound that is solid at room temperature, at least one alkanolethoxylate of formula I, at least one dispersant, water, and optionally one or more additives. A further limitation is that the suspension can comprise two dispersants. The dispersants are selected from the group consisting of the polymers of methyl 2-methyl-2-propenoate and α -(2-methyl-1-oxo-2-propenyl)- ω -methoxy-poly(oxy-1,2-ethanediyl), tristyrylphenoethoxylates, and propylene oxide/ethylene oxide block copolymers having molecular weights between 8000 and 10,000.

Specific active compounds claimed are tebuconazole or tebuconazole and trifloxystrobin or prothioconazole and fluoxastrobin or trifloxystrobin.

Determination of the Scope and Content of the Prior Art (MPEP §2141.01)

Schlatter is directed to pesticidal compositions in the form of aqueous suspension concentrates. The concentrates comprise a triazole fungicide and surfactants. The surfactants that are included are tristyrylphenol-ethoxylates and ethylene oxide-propylene oxide block polymers. The tristyrylphenol-ethoxylates typically have 8 to 40 mol ethoxylate (paragraph 0012 and 0013). The ethylene oxide-propylene oxide block polymers have an average molecular weight of 1,000-30,000 and a weight ratio of EO:PO of at least 50% (paragraph 0020 and 0021). One preferred combination is a combination of tristyrylphenol-ethoxylates and block-polymer of ethylene oxide-propylene oxide (paragraph 0026). The composition comprises fungicides. Those fungicides listed as being suitable includes tebuconazole (paragraph 0028),

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trifloxystrobin, azoxystrobin (paragraph 0030). Also mixtures of the fungicides are listed as being acceptable (paragraph 0032). Also included in the composition are dispersing agents, one exemplified is Atlox 4913, which is polymers of methyl 2-methyl-2-propenoate and α -(2-methyl-1-oxo-2-propenyl)- ω -methoxy-poly(oxy-1,2-ethanediyl).

Other ingredients that may be added include thickening agents, antifreeze agents, defoaming agents, preservatives, buffer, and adjuvants (paragraphs 0039-0045). It is taught that adjuvants that raise the biological availability and efficacy can be included. These types of compounds include alcohol ethoxylates (paragraph 0045).

***Ascertainment of the Difference Between Scope the Prior Art and the Claims
(MPEP §2141.012)***

Schlatter does not exemplify tebuconazole, trifloxystrobin, azoxystrobin, or the combination of tebuconazole and trifloxystrobin. Schlatter does not exemplify the triserylphenoethoxylate is not a salt. Schlatter does not exemplify utilizing a propylene oxide/ethylene oxide block copolymer having a molecular weight between 8000 and 10000 and an ethylene oxide proportion between 40 and 60%. Schlatter does not specify types of alcohol ethoxylates that can be utilized. However, these deficiencies are cured by Baur.

Baur teach that efficient use of crop protection agents requires a rapid uptake of the active ingredient into the plant (page 753, 1st paragraph). Adjuvants are known to increase rates of foliar penetration and surfactants are probably the adjuvant that has been studied the most (page 753, 2nd paragraph). Genapol C-100 was found to be superior under most conditions and never failed to increase penetration (abstract). Genapol C-100 with an intermediate degree of ethoxylation was found to be the most

suitable for a wide range of humidity and temperature conditions (page 760, conclusions, second paragraph).

***Finding of Prima Facie Obviousness Rational and Motivation
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art to combine the teachings of Schlatter and Baur and utilize Genapol C 100 as the adjuvant. One of ordinary skill in the art would have been motivated to utilize Genapol C 100 as the adjuvant because Schlatter teaches that alcohol ethoxylates can be utilized to enhance biological availability and efficacy. Baur teaches that Genapol C 100 was found to be superior under most conditions at increasing the penetration of the active into the plant. Therefore one of ordinary skill in the art would have had a reasonable expectation of success in incorporating Genapol C 100 into the pesticidal suspension concentrates of Schlatter.

While Schlatter does not exemplify the non-salt variety of tristyrylphenoethoxylate, the non salt variety is clearly contemplated. The formula listed in paragraph 0012 is clearly of the alcohol. Therefore it would have been obvious to one of ordinary skill in the art to use the non-salt variety of tristyrylphenoethoxylate as it is listed as a suitable surfactant to be used in the concentrate. It would have been obvious to one of ordinary skill in the art to pursue known options within his or her technical grasp, those surfactants listed as being suitable.

Regarding the claimed number of oxyethylene units of the tristyrylphenoethoxylate, Schlatter teaches that the average values are from 8-40 mol.

In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5]**

Regarding the claimed molecular weight of the propylene oxide/ethylene oxide block copolymer and the amount of ethylene oxide proportion, Schlatter teaches that the molecular weight is from 1000-30000 and the weight ratio of EO:PO is at least 50%. In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5]**

It would have been obvious to one of ordinary skill in the art to use different fungicides that are taught in the art as being suitable for pesticides to formulate a pesticidal composition. As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06.**

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

Response to Arguments

Applicant argues that (1) they have amended claim 11 to change the bridging term comprising to the more restrictive term "consisting essentially of". Applicant argues that (2) absent from the general description are the narrowly defined alkanolethoxylates (Applicants' component b). Applicant argues that (3) Atlox 4913 is a dispersing agent and does not fit applicants component b description and at best could only fit applicants' component c description. Applicant argues that (4) the Bauer article describes the penetration of methylglucose which does not have a disclosed purpose which is pesticide penetration. Applicant argues that the Bauer article indicates that difference amount species exist which would suggest a degree of unpredictability and points to page 760, right column middle of the paragraph of Conclusions for support.

Applicant's arguments filed April 23 2008 have been fully considered but they are not persuasive.

Regarding applicant's first argument, the examiner does not see where applicants believe the term "consisting essentially of" has been inserted into claim 11 as it appears that particular claim language is not present in claim 11.

Regarding applicant's second argument, while Schlatter does not disclose the more limited range ethoxylation alcohol ethoxylates as instantly claimed, Schlatter does teach that these additives which are utilized to raise the biological availability and efficacy can be included. Therefore, based on this teaching it would have been obvious to incorporate alcohol ethoxylates into the composition in order to raise the biological availability and efficacy of the actives.

Regarding applicant's third argument, the examiner agrees that Altox 4913 and 4894, which are exemplified by Schlatter would fit the component c description and not component b. However, the examiner maintains that incorporation of alcohol ethoxylates would have been obvious to include based on the teachings of Schlatter.

Regarding applicant's fourth argument, while Bauer does teach that enhanced penetration with methylglucose, it clearly teaches that genapol C-100 was superior to other surfactants under most conditions (i.e. humidity and temperature differences) and never failed to increase penetration. The unpredictability referred to by applicants does not appear to be directed to actives rather different surfactants. What is stated is "it appears that surfactants with an intermediate degree of ethoxylation, like Genapol C-100 are most suitable for a wide range in humidity and temperature. In fact, this surfactant was very efficient with other compounds such as NAA, cyanazine, and more lipophilic compounds such as bifenox. Similar observations were made for other a.i.s. and other classes of surfactants though differences among species exist. The time course of penetration of surfactants seems to be more important than compatibility with hydrophilic or lipophilic compounds." Based on these statements it would appear that the "unpredictability", if any, would occur from changing from one surfactant to other not for using Genapol C-100 with different actives as it is clearly state that this surfactant was very efficient with other compounds.

The declaration under 37 CFR 1.132 filed December 18 2008 is insufficient to overcome the rejection of claims 11-15, 17-18 and 21-24 based upon Schlatter in view of Baur.

The declaration shows a comparison of compositions comprising terbuconazole and Atlox 4894 (a compound that falls within the genus of component c of instant claims) compared to a composition containing tebuconazole and Genapol C-100 (a compound that falls within the genus of component b of instant claims). The comparison is directed to the penetration of the tebuconazole over time. Formulation A which comprises the genapol C-100 showed greater penetration overtime versus the a composition comprising which equates to components a and c of instant claims.

While the declaration does show that the incorporation of genapol C-100 does result in greater penetration of the pesticide, this is not surprising as the Bauer article clearly teaches that genapol c-100 is known to provide increased rates of foliar penetration. This declaration however does appear to show that component c is not critical for penetration as compositions comprising components a and c did not show enhanced penetration of the pesticide.

Therefore, the rejections are maintained because applicants have not provided any persuasive arguments or evidence that the incorporation of genapol c-100 would lead to unexpected results.

Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Schlatter in view of Baur and in further view of Kunz et al. (WO 02/081437, cited in the Office action mailed on 12/19/07).

Applicant Claims

The instant application claims a suspension concentrate comprising at least one active compound that is solid at room temperature, at least one alkanolethoxylate, at least one dispersant, water, and optionally one or more additives. The active compounds are prothioconazole and fluoxastrobin.

Determination of the Scope and Content of the Prior Art (MPEP §2141.01)

The teachings of Schlatter Baur are set forth above. Specifically Schlatter is directed to suspension concentrates comprising fungicides, surfactants, dispersing agents, and water. Baur teaches that Genapol C 100 is a superior penetration enhancer to use in crop protection.

***Ascertainment of the Difference Between Scope the Prior Art and the Claims
(MPEP §2141.012)***

Schlatter does not specify that the fungicides can be fluoxastrobin or prothioconazole. However, this deficiency is cured by Kunz et al.

Kunz et al. is directed to compounds that possess useful plant protecting properties and may be employed in agricultural practice (abstract). Fungicides that are listed include HEC 5725 (proposed common name fluoxastrobin, and JAU 6476 (proposed common name prothioconazole) (page 24, lines 17 and 29).

***Finding of Prima Facie Obviousness Rational and Motivation
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art to combine the teachings of Schlatter, Baur, and Kunz et al. and utilize fluoxastrobin and

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prothioconazole in the invention of Schlatter. Fluoxastrobin and prothioconazole are known fungicides and therefore it would have been obvious to use them in a pesticidal composition.

As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

Response to Arguments

Applicant argues that the N-phenethyl thioacetate acid derivatives are not among the types of active compounds specified by Applicants. There is no teaching in Kunz et al. to one of ordinary skill in the art to select the components required by Applicants while ignoring the clear teaching of Kunz et al. that the N-phenethyl thioacetic acid derivatives must be present as a necessary component.

Applicant's arguments filed December 18 2008 have been fully considered but they are not persuasive.

Firstly, the examiner would like to note that the instant claim language contains the transitional phrase comprising, therefore, if one of ordinary skill desired to

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incorporate the N-phenethyl thioacetic acid derivatives taught by Kunz et al. along with the other disclosed fungicides into the invention of Schlatter this would still render the instant invention obvious over the prior art. Secondly, the examiner utilized the Kunz et al. references to demonstrate other fungicides that are utilized for the same purpose as those of Schlatter. Some of the fungicides listed in paragraph 0164 of Kunz et al. are the same as those of Schlatter such as tebuconazole, azoxystrobin, pefurazolate, imazlil, etc. Therefore, it would have been obvious to one of ordinary skill in the art to utilize fluoxastrobin and priothioconazole as they are both taught in by Kunz et al. as fungicides, which is exactly what the active compounds of Schlatter are. Furthermore, Kunz et al. clearly teaches that fluoxastrobin and priothioconazole are functional equivalents of tebuconazole, azoxystrobin, etc. Therefore, replacement of one for another would have been obvious to one of ordinary skill in the art and one would have had a reasonable expectation of success.

Claims 11-15, 17 and 21-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Grayson (US Patent No. 5393770) in view of Schlatter.

Applicant Claims

The instant application claims a suspension concentrate comprising at least one active compound that is solid at room temperature, at least one alkanolethoxylate of formula I, at least one dispersant, water, and optionally one or more additives. A further limitation is that the suspension can comprise two dispersants. The dispersants are selected from the group consisting of the polymers of methyl 2-methyl-2-propenoate

and α -(2-methyl-1-oxo-2-propenyl)- ω -methoxy-poly(oxy-1,2-ethanediyl), tristyrylphenolethoxylates, and propylene oxide/ethylene oxide block copolymers having molecular weights between 8000 and 10,000.

Specific active compounds claimed are tebuconazole or tebuconazole and trifloxystrobin or prothioconazole and fluoxastrobin or trifloxystrobin.

**Determination of the Scope and Content of the Prior Art
(MPEP §2141.01)**

Grayson is directed to fungicidal compositions. As claimed and exemplified the composition comprises an azole in combination with an alkyoxylate of an aliphatic alcohol (claim 1). Exemplified alkyoxylates are GENAPOL C-050, GENAPOL C-080, GENAPOL C-100 and GENAPOL C-200 (tables 1-4). Suspension concentrates were formed utilizing these ingredients and water (example 1).

**Ascertainment of the Difference Between Scope the Prior Art and the Claims
(MPEP §2141.012)**

Grayson do not teach the incorporation of instantly claimed dispersing agents (component c). Grayson do not teach utilizing the specific azole tebuconazole, the strobil trifloxystrobin or a combination of tebuconazole and trifloxystrobin. However, these deficiencies are cured by Schlatter.

Schlatter is directed to pesticidal aqueous suspension concentrates. It is taught that it is common practice to formulate solid, substantially water insoluble pesticides in form of aqueous suspensions. A particular problem with these composition is the crystal growth of the active ingredient during relatively short time of storage (paragraph 0007). Due to the crystal formation, aggregate and sediment formation may occur and

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the resulting formulation becomes inhomogeneous and can block filters and nozzles of the spray equipment and the biological efficacy may be reduced (paragraph 0008).

Schlatter combats this problem by the inclusion of surfactants which prevent crystal growth. These include trisyrphenol-ethoylates and hydrophilic ethylene oxide-propylene oxide block polymers (paragraph 0011, 0012, 0020). Commercially available surfactants which are taught include Soprophor 4D384, Atlox 4913 and Atlox 4894 (paragraph 0052). . Those fungicides listed as being suitable includes tebuconazole (paragraph 0028), trifloxystrobin, azoxystrobin (paragraph 0030). Also mixtures of the fungicides are listed as being acceptable (paragraph 0032).

***Finding of Prima Facie Obviousness Rationale and Motivation
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Grayson and Schlatter and utilize surfactants such as Soprophor 4D384, Atlox 4913 or Atlox 4894 in the suspension concentrate of Grayson. One of ordinary skill in the art would have been motivated to incorporate these surfactants as Schlatter teach that a problem with aqueous suspensions is the formation of crystals and that crystal formation can be overcome by the incorporation of these particular surfactants. Based on this teaching it would have been obvious to one of ordinary skill in the art to incorporate these surfactants in order to overcome the problems associated with crystal formation during storage.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Grayson and Schlatter and utilize different fungicides in the formulation. It would have been obvious to one of ordinary skill in the

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art to use different fungicides that are taught in the art as being suitable for pesticides to formulate a pesticidal composition. As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.

Regarding the claimed number of oxyethylene units of the tristyrylphenolethoxylate, Schlatter teaches that the average values are from 8-40 mol. In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5]**

Regarding the claimed molecular weight of the propylene oxide/ethylene oxide block copolymer and the amount of ethylene oxide proportion, Schlatter teaches that the molecular weight is from 1000-30000 and the weight ratio of EO:PO is at least 50%. In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5]**

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Grayson in view of Schlatter and in further view of Kunz et al.

Applicant Claims

The instant application claims a suspension concentrate comprising at least one active compound that is solid at room temperature, at least one alkanolethoxylate, at least one dispersant, water, and optionally one or more additives. The active compounds are prothioconazole and fluoxastrobin.

**Determination of the Scope and Content of the Prior Art
(MPEP §2141.01)**

The teachings of Grayson and Schlatter are set forth above. Grayson teach compositions comprising GENAPOL compounds and azoles for effective fungicidal use. Schlatter teach surfactants that can be incorporated into aqueous suspension concentrates to overcome the crystal formation that can be problematic during storage as well as other fungicides that are known to be useful pesticide compounds.

**Ascertainment of the Difference Between Scope the Prior Art and the Claims
(MPEP §2141.012)**

Grayson and Schlatter do not specify that the fungicides can be fluoxastrobin or prothioconazole. However, this deficiency is cured by Kunz et al.

Kunz et al. is directed to compounds that possess useful plant protecting properties and may be employed in agricultural practice (abstract). Fungicides that are listed include HEC 5725 (proposed common name fluoxastrobin, and JAU 6476 (proposed common name prothioconazole) (page 24, lines 17 and 29).

**Finding of Prima Facie Obviousness Rationale and Motivation
(MPEP §2142-2143)**

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Grayson, Schlatter and Kunz et al. and utilize fluoxastrobin and prothioconazole in the invention of Schlatter. Fluoxastrobin and prothioconazole are known fungicides and therefore it would have been obvious to use them in a pesticidal composition. As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

Conclusion

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ABIGAIL FISHER whose telephone number is (571)270-3502. The examiner can normally be reached on M-Th 9am-6pm EST.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Abigail Fisher
Examiner
Art Unit 1616

AF

/Mina Haghighatian/
Primary Examiner, Art Unit 1616